(3)

No. 03-1666

Supreme Court, U.S.
FILED
JUL 19 2004
OFFICE OF THE CLERK

In The

Supreme Court of the United States

CHRISTOPHER SLAVIN,

Petitioner,

v.

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

On Petition For Writ Of Certiorari To The New York State Court Of Appeals

BRIEF IN OPPOSITION

STEVEN A. HOVANI*
Of Counsel to
THOMAS J. SPOTA
District Attorney of
Suffolk County
Criminal Courts Building
200 Center Drive
Riverhead, New York 11901
(631) 852-2463

**Counsel of Record*
for Respondent

COCKLE LAW BRIEF PRINTING CO (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

1. Does the constitutional guarantee of free expression prohibit governmental use of symbols of hatred tattooed on a criminal defendant's body?

No.

2. Once he surrendered, did petitioner have a constitutional right to prohibit photographs of tattoos on non-intimate areas of his body?

No.

3. Were petitioner's tattoos relevant to his intent to kill and motive for committing a hate crime?

Yes.

4. Can a trial court balancing the probative value of such tattoos against any unfair prejudice permit the prosecution to present expert testimony to interpret the racist symbolism?

Yes.

5. Did the prosecution's use of the tattoos, which were prior communicative statements voluntarily created by petitioner prior to being in custody, violate his privilege against testimonial self-incrimination when petitioner was neither forced to authenticate or explain them at trial?

No.

TABLE OF CONTENTS

	Page
Questions Presented	i
Table of Contents	ii
Table of Cases	iv
Preliminary Statement	1
Statement of Facts	1
Background	1
The Deception	1
The Victims	3
The Attack	3
Immediate Assistance	4
The Hospital	5
The Investigation	6
Evidence Analysis	7
Pre-trial Decisions	8
Trial	10
Mid-trial Hearing	15
The Expert	16
Sentence	18
Direct Appeal	18
Reasons Why The Petition Should Be Denied	19

TABLE OF CONTENTS – Continued

Page

I. The decision of the New York State Court of Appeals is in harmony with federal constitutional interpretation of the Fifth Amendment privilege against self-incrimination and the holding in *United States v. Hubbell*, 530 U.S. 27 (2000)..... 19

II. The decision of the New York State Court of Appeals is also in harmony with federal constitutional interpretation of the First, Fourth, Sixth, and Fourteenth Amendments..... 24

Conclusion..... 30

TABLE OF CASES

Page

CASES

Andersen v. Maryland, 427 U.S. 463 (1976) 21

Application to Quash a Grand Jury Subpoena Dated December 28, 1992, 157 Misc.2d 432 (Sup. Ct. N.Y. Co. 1993) 22

Arizona v. Fulminante, 499 U.S. 279 (1991) 30

Barclay v. Florida, 463 U.S. 939 (1983) 25

Barrett v. Acevedo, 143 F.3d 449 (8th Cir. 1998) 22

Bery v. City of New York, 97 F.3d 689 (2d Cir. 1996) 24

Boyd v. United States, 116 U.S. 616 (1886) 22

Chimel v. California, 395 U.S. 752 (1969) 28

Crawford v. Washington, ___ U.S. ___, 124 S.Ct. 1354 (2004) 21

Commonwealth v. Romero, 1997 WL 1070445, 43 Va. Cir. 530 (Cir. Ct. Va. Fairfax Co. 1997) 29

Couch v. United States, 409 U.S. 322 (1973) 24

Cupp v. Murphy, 412 U.S. 291 (1973) 26

Curcio v. United States, 354 U.S. 118 (1997) 24

Dawson v. Delaware, 503 U.S. 159 (1992) 24, 25

Doe v. United States, 487 U.S. 201 (1988) 20, 22, 24

Fisher v. United States, 425 U.S. 392 (1976) 21, 22

Gilbert v. California, 388 U.S. 263 (1967) 23

Hoffa v. United States, 385 U.S. 293 (1966) 20

Holt v. United States, 218 U.S. 145 (1910) 20

Horton v. California, 496 U.S. 128 (1990) 28

TABLE OF CASES – Continued

Page

In re Grand Jury Proceedings (Johansen), 632 F.2d 1033 (3d Cir. 1980) 21

In re Grand Jury Subpoena Duces Tecum Dated December 14,1984, Y., M.D., P.C. v. Kuriansky, 69 N.Y.2d 732, cert. denied, 482 U.S. 928 (1987)..... 22

In re Grand Jury Subpoena Duces Tecum Dated May 9, 1990, 741 F.Supp. 1059 (S.D.N.Y. 1990) 21

In re Grand Jury Subpoena Duces Tecum Dated October 29, 1992, 1 F.3d 87 (3d Cir. 1993)..... 21

In re Layden, 446 F.Supp. 53 (N.D. Ill. 1978)..... 23

In re Vanderbilt (Rosner-Hickey), 57 N.Y.2d 66 (1982)..... 21, 22

Johnson v. United States, 228 U.S. 457 (1913)..... 21

Katz v. United States, 389 U.S. 347 (1967) 20, 25

King v. State, 29 S.W.3d 556 (Tex. Crim. App. 2000)..... 29

Lauro v. Charles, 219 F.3d 202 (2d Cir. 2000)..... 27

New York v. Belton, 453 U.S. 454 (1981) 28

Oliver v. Middlebrooks, 402 F.2d 781 (5th Cir. 1968)..... 23

Pennsylvania v. Muniz, 496 U.S. 582 (1990)..... 20, 23, 24

People v. Aishman, 19 Cal. Rptr.2d 444 (Cal. App. 4 Dist. 1993) 30

People v. Allah, 84 Misc.2d 500 (Sup. Ct. Bronx Co. 1975)..... 27

People v. Alpern, 217 A.D.2d 853 (2d Dept. 1985) 24

People v. Archibald, 269 A.D.2d 682 (2d Dept.), lv. denied, 92 N.Y.2d 880 (2000)..... 28

People v. Baez, 131 A.D.2d 687 (2d Dept. 1987) 10

TABLE OF CASES – Continued

Page

People v. Bagley, 183 Misc.2d 523 (Sup. Ct. N.Y. Co. 1999) 26

People v. Barclay, 201 A.D.2d 952 (4th Dept. 1994) 28

People v. Beckwith, 303 A.D.2d 594 (2d Dept. 2003) 21

People v. Belton, 55 N.Y.2d 49 (1982) 28

People v. Berg, 92 N.Y.2d 701 (1999) 20, 24

People v. Boudreau, 115 A.D.2d 652 (2d Dept. 1985) 23

People v. Chiagles, 237 N.Y. 193 (1923) 27

People v. Colavito, 87 N.Y.2d 423 (1996) 24

People v. Copicotto, 50 N.Y.2d 222 (1980) 21, 24

People v. Cwikla, 46 N.Y.2d 434 (1979) 27

People v. DeSantis, 46 N.Y.2d 838, cert. denied, 443 U.S. 912 (1979) 28

People v. DiBella, 277 A.D.2d 699 (3d Dept. 2000), lv. denied, 96 N.Y.2d 758 (2001) 10, 26

People v. Evans, 43 N.Y.2d 160 (1977) 27

People v. Fitzpatrick, 32 N.Y.2d 499 (1973) 22

People v. Gallina, 110 A.D.2d 847 (2d Dept. 1985) 26

People v. George, 227 A.D.2d 316 (1st Dept. 1996) 10

People v. Grokey, 60 N.Y.2d 309 (1983) 27

People v. Hager, 69 N.Y.2d 141 (1987) 20, 24

People v. Herr, 203 A.D.2d 927 (4th Dept. 1994), aff'd, 86 N.Y.2d 638 (1995) 28

People v. Holmes, 304 A.D.2d 1043 (3d Dept. 2003) 20

People v. Howard, 90 Misc.2d 662 (Sup. Ct. N.Y. Co. 1977) 26

TABLE OF CASES – Continued

Page

People v. Huntley, 15 N.Y.2d 72 (1965) 29

People v. Johnson, 88 Misc.2d 749 (Co. Ct. Onondaga Co. 1976) 26

People v. Killian, 74 Misc.2d 120 (Co. Ct. Nassau Co. 1973) 26

People v. King, 232 A.D.2d 111 (2d Dept. 1997) 28

People v. Levan, 91 A.D.2d 384 (1st Dept. 1983) 28

People v. London, 124 A.D.2d 254 (3d Dept.), lv. denied, 68 N.Y.2d 1001 (1996) 26

People v. Lord, 104 Misc.2d 150 (Crim. Ct. Kings Co. 1980) 26

People v. Mars, 266 A.D.2d 316 (2d Dept. 1999) 21

People v. Marsh, 20 N.Y.2d 98 (1967) 28

People v. Mineo, 85 Misc.2d 919 (Sup. Ct. Kings Co. 1980) 27

People v. Natal, 75 N.Y.2d 379 (1990) 27

People v. Patterson, 78 N.Y.2d 711 (1991) 26

People v. Perel, 34 N.Y.2d 462 (1974) 27

People v. Peters, 135 A.D.2d 841 (2d Dept. 1987) 9, 23, 26

People v. Ramirez-Portoreal, 88 N.Y.2d 99 (1996) 27

People v. Randt, 142 A.D.2d 611 (2d Dept. 1988) 26, 28

People v. Rios, 171 A.D.2d 582 (1st Dept. 1991) 10

People v. Rodriguez, 167 A.D.2d 326 (1st Dept. 1990) 10

People v. Rodriguez, 64 N.Y.2d 738 (1984) 10

TABLE OF CASES – Continued

Page

People v. Rosario, 136 Misc.2d 445 (Crim. Ct. Bronx Co. 1987) 22

People v. Rumph, 128 Misc.2d 438 (Sup. Ct. Kings Co. 1985) 26

People v. Sallow, 100 Misc. 447 (Ct. Gen. Sess. N.Y. Co. 1917) 27

People v. Scarola, 71 N.Y.2d 769 (1988) 23

People v. Sirmons, 242 A.D.2d 883 (4th Dept. 1997), lv. denied, 92 N.Y.2d 1038 (1998) 21

People v. Siu Wah Tse, 91 A.D.2d 350, lv. denied, 59 N.Y.2d 679 (1983) 16

People v. Skinner, 53 P.2d 720 (Colo. Ct. App. Div. V, 2002) 29

People v. Slavin, 299 A.D.2d 499 (2d Dept. 2002) 18

People v. Slavin, 100 N.Y.2d 566 (2003) 19

People v. Slavin, 1 N.Y.3d 392 (2004) 19

People v. Smith, 59 N.Y.2d 454 (1983) 28

People v. Smith, 86 A.D.2d 251 (3d Dept. 1982) 23, 26

People v. Spruill, 299 A.D.2d 374 (2d Dept. 2002) 21, 28

People v. Stith, 69 N.Y.2d 313 (1987) 22

People v. Suarez, 298 A.D.2d 218, lv. denied, 99 N.Y.2d 565 (2002) 23

People v. Taylor, 294 A.D.2d 825 (4th Dept. 2002) 28

People v. Tejada, 93 N.Y.2d 963 (1999) 27

People v. Torres, 291 A.D.2d 273 (1st Dept.), lv. denied, 98 N.Y.2d 681 (2002) 26

TABLE OF CASES – Continued

Page

People v. Turiago, 90 N.Y.2d 77 (1997) 22

People v. Walls, 277 A.D.2d 959 (4th Dept. 2000), lv. denied, 96 N.Y.2d 808 (2001) 26

People v. Weintraub, 35 N.Y.2d 351 (1974) 28

People v. Whitaker, 64 N.Y.2d 347, cert. denied, 474 U.S. 830 (1983) 26, 27

People v. Williams, 170 A.D.2d 552 (2d Dept.), lv. denied, 77 N.Y.2d 1002 (1991) 26

People v. Witherspoon, 27 Ill.2d 483, 190 N.E.2d 281 (Sup. Ct. Ill. 1963) 30

Prudential Securities v. Brigianos, 233 A.D.2d 18 (1st Dept. 1997) 22

R.A.V. v. City of St. Paul, Minnesota, 505 U.S. 377 (1992) 24

Rochin v. California, 342 U.S. 165 (1952) 27

Schmerber v. United States, 384 U.S. 757 (1967). 9, 20, 23, 27

State v. Bowden, 113 R.I. 649, 324 A.2d 631 (Sup. Ct. R.I. 1974) 30

State v. Lee, 51 N.C. App. 344, 276 S.E.2d 501 (N.C. Ct. App. 1981) 30

State v. Macias, 481 So.2d 979 (Dist. Ct. App., 4 Dist., 1986), aff'd, 515 So.2d 206 (Sup. Ct. Fla. 1987) 30

State Medical Lic. Bd. v. Brady, 492 N.E.2d 34 (Ct. App. Ind. First Dist. 1986) 25

State v. Novak, 949 S.W.2d 168 (Mo. App. 1997) 29

State v. Phelps, 197 W.Va. 713, 478 S.E.2d 563 30

TABLE OF CASES – Continued

Page

State v. White, 348 S.C. 532, 560 S.E.2d 420 (Sup. Ct. So. Cr. 2002) 25

Texas v. Johnson, 491 U.S. 397 (1989) 24

United States v. Dionisio, 410 U.S. 1 (1973) 23, 26

United States v. Esdaille, 769 F.2d 104 (2d Cir. 1985) 23

United States v. Hubbell, 530 U.S. 27 (2000) 19, 20, 22

United States v. Robinson, 414 U.S. 218 (1973) 27

United States v. Wade, 388 U.S. 218 (1967) 9, 23, 26

Winston v. Lee, 470 U.S. 759 (1985) 27

Wisconsin v. Mitchell, 508 U.S. 476 (1993) 24, 25

Yarkew v. Sinclair, 495 F.Supp. 1248 (D. Minn. 1980) 25

PRELIMINARY STATEMENT

This brief is in opposition to a petition for certiorari to the New York State Court of Appeals from a decision dated February 7, 2004, which affirmed an Order and Memorandum Decision of the Appellate Division of the Supreme Court, Second Department, entered November 18, 2002, which affirmed petitioner's criminal conviction for two counts of Attempted Murder in the Second Degree, one count of Assault in the First Degree, one count of Assault in the Second Degree, and two counts of Aggravated Harassment in the Second Degree, after jury trial, in the County Court of Suffolk County (Cacciabaudo, J.). On November 18, 2002, petitioner was sentenced to three indeterminate and concurrent terms of imprisonment from twenty-five years to life on the first three counts, and concurrent terms of seven years, one year and one year on the remaining three counts. He is currently incarcerated at the Clinton Correctional Facility in Dannemora, New York. Petitioner's codefendant, Ryan Wagner, is also currently imprisoned, after his separate trial similarly resulted in conviction.

STATEMENT OF FACTS

Background

On September 17, 2000, a vicious assault on two Mexican immigrants fortunately did not result in their death. But the severity of the unprovoked attack upon them cannot be seriously questioned. The Court properly allowed the jury to consider photographs of petitioner's tattoos, taken after his surrender, because they were relevant to his motive for choosing to isolate and nearly kill two Mexican day laborers. No federal constitutional rights were violated in obtaining this conviction and certiorari should be denied.

The Deception

On September 17, 2000, around 6:15 a.m. in Farmingville, New York, Magdaleno Estrada Escamilla and Israel

Perez Arvizu were home asleep. One of their housemates, Mario Mendoza, had work lined up for that day and was waiting for his prospective employer to pick him up at the 7-Eleven store. Two people in a car told him they were looking for two workers (257).[1] During Mendoza's conversation with the petitioner, who was not driving, Mendoza mentioned that some of his housemates could work that day. Petitioner suggested that Mendoza come with them in the car and show them the house.

Mendoza entered the car through the rear passenger side door and the car door stuck a bit so he had to pull hard to open it (259). They drove to his nearby house and Mendoza went inside to see if any of his friends wanted to go to work. The second person he asked was Estrada, who agreed to go. He then woke up Perez. After a brief conversation between Perez and Estrada, Mendoza told them to come outside so they could make arrangements with the two men in the car (261-262).

Mendoza and Estrada left the building together and Estrada started to talk to its occupants. Mendoza left and started walking back to the 7-Eleven store. Before he reached the store, he noticed the car, now with four individuals occupying it, pass him. The car in question was a gold Ford Taurus station wagon with a blue interior strewn with garbage. It had an automatic transmission with the shift lever on the steering wheel (268-269). The passenger in the car had pointed out the shovels in the back of the station wagon. One of the tools was a two-handed implement for digging holes and removing dirt (271, 275-276). Mendoza identified a photograph of the car he had ridden in that morning (377). He distinctly remembered the right rear passenger door because it was dented and difficult to open (259, 277-278, 280).

---

[1] Page numbers refer to the trial transcript.

The Victims

Perez illegally immigrated to the United States in July 2000. He worked some days as a day laborer, part of a group of individuals who wait at street corners in Farmingville for contractors to hire them. On September 17, 2000, he was living at 243 Berkshire Road in Farmingville, with several other Mexicans, including Estrada and Mendoza (493-494, 501).

Estrada illegally immigrated to the United States in January 2000. He moved to Farmingville for the summer. He worked digging holes for light poles (669-671).

The Attack

When Mendoza awoke Perez, he agreed to go to work. Mendoza told him that his prospective employers, two Anglo-Saxons (one being petitioner) were waiting outside in a car (503-504, 674-675). Perez saw petitioner sitting in the front passenger's seat of the car and Estrada behind Ryan Wagner, the driver. With some difficulty, he opened the rear door on the passenger's side and got inside. Following introductions in the car, petitioner asked if they were Mexicans. They replied yes (507, 677). Petitioner asked Estrada if he had a driver's license. Estrada said no and asked if it was difficult to get one. Petitioner showed his driver's license to Estrada (677).

Wagner drove to a 7-Eleven at Exit 64 of the Long Island Expressway. Wagner, Estrada and Perez got out while petitioner stayed in the car. Wagner paid for coffees and they all got back into the car. Perez and Estrada were asked if they liked beer. Wagner said he had been to Cancun (507-508).

When the car arrived at an abandoned building site, petitioner, Perez and Estrada got out and removed two shovels, a post-hole digger, and a tire iron from the back of the car. Wagner parked nearby. Petitioner led Estrada and Perez towards the rear of the building (509-512, 678). As they were walking, Estrada was concerned about how abandoned the building looked. Perez tried to allay his

fears (518, 678, 683). Wagner told them to start cleaning up the basement. They complied using the tools Wagner had removed from the car, including the post-hole digger which was described as a double shovel used to make holes in dirt (518).

Perez and Estrada began working and petitioner left the basement. He and Wagner returned shortly thereafter, approaching the two men from behind. Suddenly petitioner hit Estrada with the post-hole digger in the back of the head. Estrada fell and Perez thought that the hard blow might have killed his friend. Meanwhile, Wagner came at Perez with a folding knife, cutting him on the hand. Perez dropped the shovel and backed away while Wagner advanced with the knife. Simultaneously, Perez could see petitioner beating Estrada. Perez began to run, precipitating a scream from Wagner "He's getting away!" (520-521, 684).

As Perez got outside the building, his muddy boots caused him to slip and fall but only his left hand touched ground (606, 651-654, 658). As he got back up on his feet, petitioner caught up with him and delivered a glancing blow with the post-hole digger to the left side of Perez's head. Perez screamed, "Help me!" Estrada got to his feet and ran towards petitioner. Perez noticed Wagner again advancing towards him with the knife. He picked up a stick to try to defend himself, but he dropped it when Wagner cut him on his shoulder and hand. Estrada managed to hit Wagner in the back, prompting him to run. When Estrada returned, he helped Perez run towards the Expressway (518-523, 603-609, 634-637, 685-686).

Immediate Assistance

Estrada and Perez reached the expressway around 7:00 a.m. Some cars swerved away, but Steven Serrecchia stopped to help. He used a fan belt to stop the blood gushing from Perez' right wrist (64-69). Soon Deputy Sheriff James Rochford came on the scene, and he applied bandages to both arms of Perez (81-90). At 7:11 a.m., Officer Brian Connelly responded to the emergency call. He observed

pools of blood below the wrists of Perez. Officer Connolly contacted a Spanish speaking 911 operator who could translate for the victims (118-225). Officer Jeffrey Klug was dispatched to search the abandoned building for evidence (105-117). Lew Morgenstern was an EMT who recognized the need for advanced life support. Perez went into the first ambulance. Estrada followed in another (188-198). They were both brought to Brookhaven Memorial Hospital.

The Hospital

Lillian Lopez, a certified emergency nurse, and Doctor Shari Becker tried to control Perez' bleeding in the emergency room, but it made inspection of the wounds difficult. Perez had a deep cut on his right wrist, a slash on his left forearm, another slash on his face to his right ear, and two more cuts on his left shoulder (524-527). After applying a tourniquet, the bleeding slowed sufficiently to observe that it was the ulna artery and that there was tendon and muscle damage five centimeters deep to the victim's bone. They determined the wrist wound to be life threatening. Forty minutes after arrival, the bleeding vessel was ligated by Doctor Prichip (1414-1416, 1447-1455).

Doctor Kenneth Kneessy was the plastic surgeon who repaired many of Perez' injuries, including the lacerated tendon, another partially severed tendon, and the cuts in the medial nerve. He also considered the injuries to have been life threatening (1483-1488). Doctor Alan Nemeth, a physician specializing in emergency medicine at Brookhaven Memorial Hospital, treated Estrada (1432-1435). The victim had a two centimeter wound on the back of his head and complained of back, neck and shoulder pain (1435). In the physician's professional opinion, a single blow to the back of the head could have caused death (1437). Perez would later testify about the residual pain of his injuries, lasting more than a year after the assault (528, 543). He endured extended medical attention including rehabilitation (529-530). The weakness in his right hand prevented him from working for three months (544-545).

The Investigation

On September 17, 2000 around 8:00 a.m., several police officers responded to an abandoned building on Napcon Drive in a Shirley industrial complex (432). As Officer Peter Reilly and his partner, Officer McLaughlin, drove near the building, they encountered a green minivan parked on the south side of the road. Because they considered it odd to find a vehicle there at that time of day, they pulled in behind the vehicle. One of the occupants got out and asked if it was okay to walk his dog there. Officer Reilly replied in the affirmative (433-434). The officers then continued to the abandoned building and met with Officer Jeffrey Klug.

As Officer Klug was leaving the industrial complex he also noticed the green minivan parked on the shoulder of the road (470-472). He considered it odd that none of the occupants of the van looked at him as he drove by. He discerned them to be three white males. Officer Klug stopped and noted the plate number to run a registration check at 8:14 a.m. (472-474). When the minivan made a u-turn and passed him, he followed it (474-475). After following the minivan onto the Long Island Expressway going west, Officer Klug turned back at Exit 67 (478-480). Later that same morning, Officer Klug learned the minivan was registered to a Ronkonkoma business called Delta Well and Pump Company (479).

At about 8:00 p.m. that day, Detective Allen VanWickler followed up on the green minivan plate number. At Delta Wells on Union Avenue in Holbrook, he spoke with Donna Bensin, the president of the company. She initially claimed that she knew nothing about the vehicle with the indicated license number, but when a one-letter correction was made, she acknowledged corporate ownership of the green minivan (1064-1065). She promised to find out who had been using it (1066). Around two hours later, Detective VanWickler received a call from Peter Horvath, who stated that he, Wagner (whom Horvath claimed to only know by first name), and petitioner had used the van for a

dog run (1067). Horvath said petitioner suggested the industrial park instead of the beach (1067).

VanWickler also spoke to petitioner on the phone that night. Petitioner gave his address as 66 Old Country Road, Melville, even though it was his girlfriend's parents' home and not his residence. He also denied knowing Wagner's last name. Asked why they chose to run dogs there, petitioner admitted knowing that area as a previous job site where he had worked (1077-1078).

On Sunday, September 23, 2000, VanWickler went to 66 Old Country Road in Melville and met Karl Bensin, the head of Bensin Construction. His daughter, Amy Bensin, was petitioner's girlfriend (1079-1080).

After interviewing Karl Bensin and his wife, Detective VanWickler and his partner drove to 182 Union Avenue and observed a white Lotus parked in the driveway. They also noted a red Honda with a Pennsylvania license plate and a white Ford Taurus station wagon. They recorded all three licenses for registration checks (1081).

Evidence Analysis

Officer John White processed the broken post-hole digger and recovered two hairs from the tool, as well as some blood (815).

On October 3, 2000, Officer White participated in executing a search warrant on petitioner's 1990 Ford Taurus, with instructions to dust the car for fingerprints (822). His examination revealed scrape marks along the exhaust pipe of the vehicle, which was consistent with the victim's statements that the car had scraped its undercarriage before the tools were removed from the car (768, 828).

Ann Juston, a forensic scientist, performed DNA analysis on a number of samples associated with this crime and compared them with four known samples previously obtained from petitioner, Wagner, Perez and Estrada. A swab obtained from the area of the assault matched the DNA sample received from Estrada (1000).

The saliva stain obtained from the lip area of a 7-Eleven coffee cup found floating at the scene also matched Estrada's DNA profile (1002). The swab from the handle of the post-hole digger and from the metal portion of the post-hole digger matched the DNA profile of Perez (1002, 1004). Two stains recovered from the driver's seat of the Taurus matched the DNA profile of Ryan Wagner (1005).

Thomas Saveski, a forensic scientist, examined hair from petitioner, Wagner, and Perez. Petitioner and Wagner both had Caucasian hair with Wagner's hair being dyed a lighter color. Perez had hair of a mixed racial origin. The hair found on the post-hole digger was also of mixed racial origin so it did not come from petitioner or Wagner but could have come from Perez (1120-1138).

Donald Doller, a forensic scientist, examined several items, including five pairs of known footwear. One pair came from each victim, one pair of boots belonged to petitioner, and two pairs were from Ryan Wagner (1148-1160). Doller compared the prints produced by those boots with questioned footprints on various items recovered from the crime scene. One print, the outline of a shoe, was consistent with the size 9 right boot worn by petitioner (1161). During his examination of the 1990 Ford Taurus station wagon, Doller noted that the right rear passenger door was difficult to open and made a noise because of a dent (1167). He also confirmed that the tire iron found at the scene came from a Ford (1168).

Pre-trial Decisions

After a mysterious absence from Suffolk County between September 19, 2000 and November 1, 2000, petitioner surrendered with his attorney to the Suffolk County District Attorney's Office. Co-defendant Ryan Wagner had already surrendered on October 10, 2000. Petitioner's attorney informed the prosecution that his client would not be making any statements. During the arrest process, police officers photographed petitioner and his tattoos. Subsequently, defense counsel moved to suppress the tattoo photographs, arguing, inter alia, that

their taking and use violated petitioner's constitutional rights under the Fourth, Fifth and Sixth Amendments to the United States Constitution. The prosecutor argued that arrest photographs were proper but also moved to have a second set of photographs taken pursuant to court order under New York State Criminal Procedure Law §240.40(2)(b)(iv) and (v) as non-testimonial exemplars.

On February 26, 2001, the County Court of Suffolk County (Cacciabaudo, J.) issued a Memorandum Decision denying petitioner's motion for suppression of the photographs and granting the motion for court-ordered exemplars. The court noted that probable cause was not in issue because petitioner had surrendered. The court rejected the argument that a subject in custody has a legitimate expectation of privacy, which would prevent the photographs in question. Photographing tattoos was held to be a minimal intrusion that, under the Fourth Amendment, was neither an unreasonable search and seizure nor a violation of the right to privacy. Relying on *Schmerber v. United States,* 384 U.S. 757 (1966) and *People v. Peters*, 135 A.D.2d 841 (2d Dept. 1987), the court held that photographing physical characteristics was not a taking of testimonial evidence subject to the Fifth Amendment privilege against self-incrimination and that such arrest processing was not a critical stage requiring the presence of counsel under the Sixth Amendment. Finally, the court granted the request for the retaking of photographs of petitioner's tattoos as nontestimonial evidence for proof of his motive to commit the crimes charged.

Following a *Wade* hearing held on May 30 and June 6, 2001, the County Court held, in a decision dated June 8, 2001, that the lineup identification of petitioner by Perez on November 2, 2000 was not suggestive and would be admissible at trial. Photographs of the lineup would also be admissible.

On July 26, 2001, defense counsel submitted a motion in limine to preclude any testimony about or photographs of the tattoos because they were irrelevant and prejudicial. At this hearing, defense counsel made the following objections

to the tattoos, all of which were considered prior to jury selection: (1) that the tattoos had no relevance; (2) that the tattoos were communicative and not for purpose of identification; (3) that expert testimony about tattoos would be unable to connect the meaning of the tattoos to the crime charged; (4) that white supremacy ideology was collateral to the issue of guilt; (5) that Nazi insignia are anti-Semitic but not necessarily anti-Hispanic; (6) that creation of the tattoos was too remote for them to be admissible for acts committed five to seven years later; (7) that the tattoos were more prejudicial than probative; and (8) that these tattoos should be treated like evidence of uncharged crimes which required a pre-trial hearing on admissibility.

The prosecution opposed the motion by oral argument and responded that it is permissible to display relevant tattoos in court and identification was not the sole basis for admissibility, citing *People v. Rodriguez*, 64 N.Y.2d 738 (1984); *People v. DiBella*, 277 A.D.2d 699 (3d Dept. 2000), *lv. denied*, 96 N.Y.2d 758 (2001); *People v. George*, 227 A.D.2d 316 (1st Dept. 1996); *People v. Rios*, 171 A.D.2d 582 (1st Dept. 1991); *People v. Rodriguez*, 167 A.D.2d 326 (1st Dept. 1990); and *People v. Baez*, 131 A.D.2d 687 (2d Dept. 1987). The point was also made that Nazis hated all non-Aryans, not just Jews. The court was asked to adhere to its prior ruling on the tattoos. The prosecutor declined to seek a pre-trial ruling for petitioner's tattoos as admissible prior bad acts. The court denied the motion in limine in a written decision on September 10, 2001.

Trial

In her opening statement, the prosecutor outlined the evidence to be presented and explained that the tattoos would not be introduced to identify petitioner but to explain his state of mind and motive for the crime.

After describing the deception and the attack, Perez described the car in which he rode to the crime scene as a gray four door Ford Taurus, with blue interior and a rear passenger side door that was difficult to open. He identified a photograph of petitioner's car as the same car he

rode in that day (540). Perez also testified that he picked petitioner out of a lineup composed of six similarly attired individuals all wearing glasses on November 2, 2000. He had also identified Ryan Wagner in a lineup on October 11, 2000. He testified that these were the two men who attacked him and Estrada.

When Estrada testified, he described the crime but made no in-court identification. He had been unable to identify either petitioner or Wagner at lineups held on March 2, 2001, six months after the crime, which was when he was brought back from Mexico.

In addition to the testimony of the victims, the law enforcement personnel, and the civilian witnesses, which has already been described, several acquaintances of petitioner also testified.

In September 2000, Peter Horvath had been friends with petitioner for seven years. They lived with their respective girlfriends, Anna Barna and Amy Bensin, at 182 Union Avenue in Holbrook. On September 16, 2000 the four of them had gone on a fishing trip organized by Bensin Contracting, after which they had returned to 182 Union Avenue in Bensin's mother's green minivan (300-301). At about 6:00 p.m., while Horvath and petitioner were alone in the house, they heard loud Spanish music coming from a band at the house across the street. Petitioner called the police who came to the house across the street in twenty minutes and then the music stopped (293, 296, 299-306, 315-317).

While it was still dark on the morning of Sunday, September 17, 2000, Horvath saw Ryan Wagner twice. The first time was when the sensor light on the first-floor deck outside his room turned on. He walked outside and saw Wagner. Horvath asked him what he was doing standing next to the deck. Horvath suggested that Wagner should go home and go back to bed (317, 320-325).

Horvath next saw Wagner at 7:45 that morning. Petitioner came to Horvath's room and asked if he wanted to join them for a dog walk. Horvath agreed and drove the green minivan belonging to Donna Bensin. Wagner was in

the front passenger seat, and petitioner sat in the back. Horvath followed petitioner's directions to Exit 68 on the Long Island Expressway, ultimately turning into an industrial park. While they were stopped but still inside the van, a police car pulled in behind them. Petitioner asked about walking the dog (320-329, 332-334).

Shortly after 10:00 p.m., Horvath was awakened in his room by petitioner and Bensin. The police were asking about the van and Horvath had been the driver. Reluctantly, he called Detective VanWickler and told him that he and two others had been in that area. Because he did not have a valid driver's license, Horvath told the police that petitioner drove the van (340-346).

Horvath had no idea where petitioner went between the day after the attack and the day before petitioner surrendered about six weeks later. During Horvath's acquaintance with Wagner, Wagner drove two cars, one of which was petitioner's Ford station wagon. That car remained parked at 182 Union Avenue while petitioner was gone. Two weeks after the attack, Horvath and Barna moved out of 182 Union Avenue and into her parent's home. When Horvath finally saw petitioner on November 1, 2000, petitioner had grown a full beard (347, 361, 407-410).

During his years of friendship with petitioner, Horvath learned that they shared personal beliefs on many issues (411), including their heritage. He knew petitioner studied the Bible. Horvath testified that Christian Identity was based on a biblical interpretation that Abraham and the other patriarchs of the Bible were of European descent. As a Christian Identity follower, Horvath believed people of European descent should stick together and he believed petitioner felt the same way. During discussions about "[their] people," i.e., white people, he and petitioner had discussed the ten northern tribes of Israel. Petitioner had also expressed his belief that Europeans should stick together and keep apart from non-European races (411-416).

Horvath identified People's Exhibits 19 through 34 as photographs of tattoos that were on petitioner's body in

September 2000, the most recent being about five years old (374, 384-386, 393-397).

Anna Barna was Horvath's girlfriend. She corroborated Horvath's testimony about the living arrangements at 182 Union Avenue and about petitioner calling the police to complain about the loud music (1023, 1027-1031).

On the morning of September 17, 2000, Barna heard someone leave the house at 6:30 a.m. Around 8:00 a.m., petitioner came into the downstairs bedroom and asked Horvath if he wanted to take the dogs for a walk. Barna heard petitioner say "I know a good place for a run." Barna saw Horvath, his dog, petitioner and Wagner before they left. She had met Wagner about eight times and knew him as petitioner's friend. She saw a new cut on Wagner's knuckles and asked him if he was okay. Wagner told her "Don't worry about it". Petitioner told her they would not be back right away. They left in the green minivan but returned about ninety minutes later. Wagner stayed for about another hour and then he left by himself (1036-1041).

Barna testified she was familiar with petitioner's religious beliefs because they had spoken about petitioner's literal understanding of the Bible. She also remembered him complaining that the Government does nothing about undocumented day laborers. This comment was made after he read a news article several months before September 2000 (1047-1048, 1053).

Amy Bensin had been petitioner's girlfriend for about five years. They had lived together for four years, two years at 182 Union Avenue. On September 17, 2000, Bensin saw petitioner and Wagner in the kitchen at 182 Union Avenue at about 7:00 a.m. Before petitioner left, he asked if anyone wanted breakfast. They were gone much longer than necessary for getting breakfast. Bensin was mad they had taken her mother's van for so long. She asked them where they had been but did not get an answer (1225-1236).

When her mother called that evening, Bensin put petitioner on the phone. She remembered he told her

mother they used the van to take the dog for a walk (1210-1211, 1225-1240).

The next morning, Bensin left for work without seeing petitioner. She came home around 4:00 p.m. and watched television with petitioner. They saw a story about two Mexicans getting hurt. He mentioned he was going to visit his sick grandfather but that was the first time she had heard there was some illness. Petitioner did not say goodbye and she never saw him again until the trial. His car remained parked at 182 Union Avenue from September 18 to November 2. Petitioner did call her two or three times but only reached her answering machine. She never learned where he went (1222, 1242-1243, 1250-1255, 1260-1265).

Bensin said she knew nothing about petitioner's religious beliefs but she knew he believed the races should stay separate. She had also heard him use racial epithets (1274-1281).

Cornelius Collins was petitioner's immediate supervisor at Bensin Contracting, had sponsored petitioner's application to the Plumbers' Union at the request of Amy Bensin's father. One of the Bensin Company job sites was located in the same Shirley industrial site as the scene of the crime. Petitioner had worked at that Shirley site for two to three weeks prior to September 17, 2000. Collins last saw petitioner at work on Monday, September 18, 2000. The next day petitioner did not show for work. Collins never heard any explanation about why he stopped working (1282-1289).

Karen Evans, a Verizon investigator, authenticated telephone company records relating to certain New York City pay phones located in the same general vicinity ranging from 50th to 53rd Streets and between Sixth and Seventh Avenues in Manhattan. Evans also authenticated telephone records for a Hess gas station at 301 Union Avenue in Holbrook. She identified the phone number 631-467-7823 as being assigned to Donna Bensin at 182 Union Avenue in Holbrook. She identified the phone number 718-894-3869 as belonging to Dennis Wagner at 59-57 60th Lane in Maspeth, Queens. 718-894-6993 was assigned to Arpol Karlson

in Maspeth. A 917 number could only be identified as going to a cell phone or pager. Nineteen phone calls were correlated by Detective Investigator Thomas McDermott and summarized to likely be frequent calls between petitioner on Long Island and Wagner in New York City.

James O'Mara, a supervisor employed by AFD Contracting Furniture, authenticated his company's records, which showed that Ryan Wagner was making a delivery at 51st Street near Seventh Avenue in Manhattan on September 18, 2000, the day repeated telephone calls had originated from that area to 182 Union Avenue (1631-1635).

Mid-trial Hearing

In camera, an extensive discussion ensued regarding the proposed expert testimony of a New Jersey investigator with knowledge about skinheads and white supremacists. Defense counsel argued that these were not scientific topics and that no one should be qualified as an expert about them, especially a police officer. He also urged that the tattoos should not be considered evidence at all but, once they were admitted, the proposed expert testimony was improper bolstering. He pointed out that there was no connection between petitioner and any gang activity. Co-counsel for petitioner noted that since tattoos were art with multiple interpretations, the expert testimony was not helpful because swastikas and SS lightning bolts were not beyond the ken of a typical juror. He also posited that the First Amendment should protect petitioner's private thoughts about his tattoos (1397-1400, 1539-1548).

The prosecution countered that expert testimony was needed to explain that a white fist meant white power, that the initials NYHC had to be interpreted for the jury since New York Hate Corps was not common knowledge for a typical juror, and that the tattoos, by themselves, were not testimony so expert testimony was needed to explain them. Despite being over five years old, the tattoos were still relevant to petitioner's state of mind. The prosecutor agreed that there would be no proof that petitioner had any gang connection (1549-1554).

The court ruled that the expert could not testify what petitioner may have been thinking but only what the tattoos appeared to mean. The court held that the tattoos relevance to the Aggravated Harassment counts outweighed any unfair prejudice. The court agreed to give a limiting instruction for the expert testimony so the process would be fair overall (1554-1555, 1557-1559).

Prior to testifying before the jury, Sergeant Louis Jordan was questioned in a mid-trial hearing to establish the scope of his expertise. After delineating his credentials, Jordan claimed expertise in white supremacy, motorcycle gangs, satanic cults, street gangs and prison gangs (1575-1593).

Defense counsel renewed his Fifth Amendment argument and the Court again rejected it, relying on *People v. Siu Wah Tse*, 91 A.D.2d 350 (1st Dept.), *lv. denied*, 59 N.Y.2d 679 (1983). The Court ruled that expert testimony could be based on personal experience without scientific study as long as it is helpful to the jury. Thus, the expert could testify about the meaning of certain tattoos. The Court prohibited the expert from testifying that petitioner's tattoos made him a member of any particular group or that the tattoos meant petitioner shared the beliefs of any particular group (1624-1628).

The Expert

Louis Jordan testified before the jury about his expertise. His testimony has been set forth on pages 38a-64a of the petition for certiorari. The court qualified Jordan as an expert in white supremacy groups and gangs, including tattoos (1644-1664).

Jordan was shown ten photographs of petitioner's tattoos (People's 21, 22, 23, 25, 26, 27, 28, 29, 30, and 32). He described what the various tattoos depicted and how various parts of each tattoo could be recognized as meaningful to a white supremacist (1665-1675).

People's 22 used red and black (the colors of Nazi Germany) and the Nazi swastika with a white fist, which

meant white power. There was also a Celtic cross, which indicated northern European ancestry (1665-1666).

People's 21 depicted a kneeling person with a large nose, a beanie cap, and a coat with money sticking out. This represented a Jewish person. Approaching him, a skinhead was aiming to kick him. The skinhead was identifiable from the Doc Martin boots, rolled up pants, and red suspenders. He held an axe, a bottle of alcohol, and bore a sinister, clown-like visage (1666-1667).

People's 32 also used red and black letters for Nazi reference. The letter "FTW" stood for "Fuck the World," a common phrase among gangs and white supremacist groups. "NYHC" referred to the New York Hard Core also known as the New York Hate Corps. They were a punk rock band that played music featured by skinheads (1668-1669).

People's 23 was the tattoo on the back of petitioner's neck. The letters "ACAB" stood for "All Cops Are Bastards" which is a well known lyric sung by a punk rock band known as the Four Skins. The name of the song is "The Good, the Bad, and the Four Skins" (1669-1670).

People's 28 showed an arrow coming up out of a cloud or body of water. This was an ancient Norse rune known as a "Teawas." It stood for justice and was commonly used by Vikings on their weapons and armor. Below the rune was a Viking ship and the Celtic sign for infinity (1670-1671).

People's 30 also depicted a Viking ship with many shields along the side. This meant pure white chosen people (1671-1672).

People's 29 had a Viking blowing a horn. The warrior stood for white power. There was also the Celtic sign for infinity (1672).

People's 27 had an American flag above the Nazi swastika below a cloud. This was a symbol of hatred. There was another Celtic cross. There was also a skinhead holding up a club and restraining a pit bull on a leash wearing a spiked collar (1673).

People's 25 also combined the American flag, the Nazi swastika, and a bald eagle. This symbolized strength. Two

lightning bolts together was the rune for the Nazi elite military group known as the SS. This storm trooper insignia is used by skinhead security forces. The tattoo also depicted a skinhead wearing braces (suspenders) on a bare chest and holding a flaming club as he stepped upon human skeletal remains (1673-1674).

People's 26 was similar to People's 25. There was a Nazi swastika in a cloud, an American bald eagle, the SS lightning bolts, and a skinhead holding a club. A tank was crushing human skulls as it emerged from a city on fire (1675). The People rested after Jordan's testimony.

Sentence

On October 4, 2001, petitioner appeared for sentencing in the County Court (Cacciabaudo, J.). Defense counsel asked for leniency and pointed out that petitioner broke off the attack and ran away (see sentence minutes, p. 9).[2] The court noted that a juror, after discharge, had been reported in the media saying the tattoos were not considered during deliberations. (See sentence minutes, p. 26). Petitioner was sentenced to three concurrent and indeterminate terms of incarceration from twenty-five years to life in prison, plus concurrent terms of seven years, one year, and one year on the other three counts. Petitioner thus avoided consecutive sentencing for two victims.

Direct Appeal

On direct appeal, petitioner raised numerous issues including his claim that the tattoos were not relevant and too prejudicial. On November 25, 2002, the Supreme Court of New York, Appellate Division, Second Department, affirmed the judgment of conviction without any mention of the tattoo evidence. *People v. Slavin,* 299 A.D.2d 499 (2d Dept. 2002).

---

[2] The sentencing minutes were not transcribed until after the conviction was affirmed by the New York State Appellate Division but were later provided to petitioner and the New York State Court of Appeals prior to argument in that higher court.

On June 11, 2003, Chief Judge Judith Kaye granted leave to appeal to the New York State Court of Appeals. *People v. Slavin*, 100 N.Y.2d 566 (2003). On appeal from the Appellate Division, petitioner again raised numerous objections to the tattoo evidence in his brief and at oral argument, which was heard on January 8, 2004. On February 17, 2004, the judgment below was affirmed. *People v. Slavin*, 1 N.Y.3d 392 (2004). Four judges agreed there was no compelled self-incrimination. Two judges dissented, in part, in an opinion that held there was error, but that it was harmless beyond a reasonable doubt. The only reason this was a dissent instead of an opinion concurring in result was because they would have reversed the Aggravated Harassment misdemeanors.

REASONS WHY THE PETITION SHOULD BE DENIED

I. The decision of the New York State Court of Appeals is in harmony with federal constitutional interpretation of the Fifth Amendment privilege against self-incrimination and the holding in *United States v. Hubbell*, 530 U.S. 27 (2000).

Use of tattoo photographs with expert testimony to prove the motive for a hate crime is entirely proper. Throughout the criminal prosecution of petitioner, the argument was advanced that tattoos that communicate thought processes are testimonial and thus their use cannot be compelled consistent with the Fifth Amendment privilege against self-incrimination. However, use of statements voluntarily made in the past is not compulsion of testimony and the New York Court of Appeals so recognized. Using physical characteristics of a defendant's body as evidence is clearly permissible under case law interpreting the Fifth Amendment. Furthermore, to compare tattoos to other previously created written statements such as documents is not a dubious analogy. *United States v. Hubbell*, 530 U.S. 27 (2000) is directly on point and was correctly relied upon by the majority in the decision below.

The United States Constitution provides that, "no person shall be compelled in any criminal case to be a witness against himself." U.S. CONST. amend. V. This privilege arose in England in response to coerced confessions in ecclesiastical courts. Heretics who confessed were killed quickly and those who remained obdurate were burned alive. The legal concept does not forbid the use of incriminating testimony but rather government compulsion to create such testimony. Thus, the word "witness" limits the category of compelled incriminating communications to those that are testimonial in character. *United States v. Hubbell*, 530 U.S. 27 (2000); (production of subpoenaed documents can be testimonial); *Pennsylvania v. Muniz*, 496 U.S. 582 (1990) (fact speech of drunk driver was slurred was incriminating but non-testimonial); *Doe v. United States*, 487 U.S. 201 (1988) (consent form for disclosure of unidentified bank documents would not acknowledge existence, possession, or authenticity so non-testimonial); *Schmerber v. California*, 384 U.S. 757 (1966) (privilege from production of evidence of testimonial or communicative nature does not apply to drawing of blood); *Holt v. United States*, 218 U.S. 245 (1910) (compelling defendant to wear specific blouse did not contravene privilege against extorted communications because there is no exclusion of the defendant's body as material evidence). Nor does the privilege bar the seizure of testimonial evidence. The government is only precluded from compelled creation of incriminating testimony. *Katz v. United States,* 389 U.S. 347 (1967); *Hoffa v. United States*, 385 U.S. 293 (1966).

Petitioner has focused on the "communicative" aspect of his tattoos and urged that they are, therefore, testimonial under *Schmerber, id.* The New York State Court of Appeals has defined "testimonial or communicative evidence" to be that which reveals a person's subjective knowledge or thought processes. *People v. Berg*, 92 N.Y.2d 701 (1999); *People v. Hager*, 69 N.Y.2d 141 (1987). However, it should be recognized that prior voluntary communicative acts are distinguishable from those communicative acts which retain the testimonial aspect required under Fifth Amendment analysis. *People v. Holmes*, 304 A.D.2d 1043

(3d Dept. 2003) (tattoo with nickname "Polo" was communicative but its display to jury was non-testimonial); *People v. Spruill,* 299 A.D.2d 374 (2d Dept. 2002) (alteration of tattoo from "Pike" to panther evinced consciousness of guilt); *People v. Mars,* 266 A.D.2d 316 (2d Dept. 1999) (love letters from defendant to non-spouse which were found by defendant's estranged husband were admissible as motive). Prior communications without any testimonial aspect are outside the constitutional privilege. *Crawford v. Washington,* ___ U.S. ___, 124 S.Ct. 1354 (2004).

Aside from communicativeness, the act of producing evidence can run afoul of the privilege under certain circumstances. *Andersen v. Maryland,* 427 U.S. 463 (1976) (no violation where voluntarily created documents were seized from defendant and authenticated by third person); *Fisher v. United States,* 425 U.S. 392 (1976) (defendant's tax documents were seized from accountant so no violation of privilege which is personal); *Johnson v. United States,* 228 U.S. 457 (1913) (party is privileged from producing the evidence but not from its production); *In re Grand Jury Subpoena Duces Tecum Dated October 29, 1992,* 1 F.3d 87 (3d Cir. 1993) (act of production can violate privilege if existence and location of evidence unknown to government or where production will constitute authentication); *In re Grand Jury Proceedings (Johansen),* 632 F.2d 1033 (3d Cir. 1980) (private appointments date books protected from production); *In re Grand Jury Subpoena Duces Tecum Dated May 9, 1990,* 741 F.Supp. 1059 (S.D.N.Y. 1990) (privilege protects personal non-business documents); *In re Vanderbilt (Rosner-Hickey),* 57 N.Y.2d 66 (1982) (act of producing tape recording required vouching for circumstances of preparation and accuracy which is implied authentication and privileged); *People v. Copicotto,* 50 N.Y.2d 222 (1980) (defendant could be source of sales receipts because existence and fact of possession known to prosecution; only more private papers are privileged to protect inner sanctum of individual feeling and thought); *People v. Beckwith,* 303 A.D.2d 594 (2d Dept. 2003) (marijuana in pocket of arrestee who admitted possession prior to *Miranda* was still admissible real evidence); *People v. Sirmons,* 242 A.D.2d 883 (4th Dept. 1997), *lv. denied,* 92 N.Y.2d

1038 (1998) (alibi evidence discoverable since defendant already intends to use at trial); *Prudential Securities v. Brigianos*, 233 A.D.2d 18 (1st Dept. 1997) (subpoena for securities documents quashed); *Application to Quash a Grand Jury Subpoena Dated December 28, 1992*, 157 Misc.2d 432 (Sup. Ct. N.Y. Co. 1993) (no privilege implication for discovery that contributes no new knowledge to government beyond statement itself). The testimonial nature of the production is what places these examples within or without the privilege.

Under the "foregone conclusion" theory, an act of production does not violate the privilege where the government already knows the evidence exists and the nature of its possession. *United States v. Hubbell, id.*; *Doe v. United States, id.*; *Andresen v. Maryland, id.* Petitioner's tattoos fit neatly into this exception for acts of production since their discovery was inevitable under normal police procedures. *People v. Turiago*, 90 N.Y.2d 77 (1997); *People v. Stith*, 69 N.Y.2d 313 (1987); *People v. Fitzpatrick*, 32 N.Y.2d 499 (1973). And once the tattoos were revealed, their use as evidence did not depend on testimony from petitioner. *In re Grand Jury Duces Tecum Dated December 14, 1984, Y., M.D., P.C. v. Kuriansky*, 69 N.Y.2d 232, *cert. denied*, 482 U.S. 928 (1987); *In re Vanderbilt (Rosner-Hickey), id.*

This Court originally indicated that the privilege against compelled self-incrimination prohibited any use of evidence contained in private papers to prove a person's guilt. *Boyd v. United States*, 116 U.S. 616 (1886). But the apparent conceptual basis for this view, a Fifth Amendment concern for privacy, is no longer viable. *Fisher v. United States, id.*; *Doe v. United States, id.*; *Barrett v. Acevedo*, 143 F.3d 449 (8th Cir. 1998). Modern interpretation of the privilege does not protect any privacy interest in the contents of a private written statement voluntarily created. Furthermore, even if a personal document like a diary were protected under a minority interpretation of the privilege, such a theory should not extend to an easily observed tattoo. If defendant surrendered to police with a letter in his pocket about how he hated Mexicans, that would be admissible as evidence. Tattoos on non-intimate

areas of the body can be seen and described without a defendant's involvement. Thus, tattoo photographs taken after arrest or by court order can be discussed by an expert without any defendant involvement at trial.

We must reiterate our position that the communicative aspect of some tattoos does not lessen the essence of all tattoos: physical characteristics whose observation requires no testimonial act. *Pennsylvania v. Muniz, id.*; *United States v. Dionisio,* 410 U.S. 1 (1973); *Gilbert v. California,* 388 U.S. 263 (1967); *United States v. Wade,* 388 U.S. 218 (1967); *Schmerber v. California, id*; *United States v. Esdaille*, 769 F.2d 104 (2d Cir. 1985) (all physical characteristics are non-testimonial and display may be compelled with admissibility depending on reliability); *Oliver v. Middlebrooks*, 402 F.2d 781 (5th Cir. 1968) (needle tracks on arm were available as evidence because body itself is outside protection of Fifth Amendment); *In re Layden,* 446 F.Supp. 53 (N.D. Ill. 1978) (attempt to get defendant to feign handwriting exemplars was more than physical characteristic and violated privilege); *People v. Scarola,* 71 N.Y.2d 769 (1988) (tattoos are non-testimonial); *People v. Suarez*, 298 A.D.2d 218 (1st Dept.), *lv. denied,* 99 N.Y.2d 565 (2002) (photographs of non-injury and tattoo showed physical characteristics which could be seen by jury at trial anyway); *People v. Peters*, *id.* (photograph of Rasta hair was non-testimonial); *People v. Boudreau*, 115 A.D.2d 652 (2d Dept. 1985) (physical coordination tests for sobriety outside protection of privilege); *People v. Smith*, 86 A.D.2d 251 (3d Dept. 1982) (voice exemplar was physical characteristic and thus privilege inapplicable); *People v. Rosario*, 136 Misc.2d 445 (Crim. Ct. Bronx Co. 1987) (unlike physical act such as nod or shake of head, breathing into breathalyzer is non-testimonial).

Petitioner also maintains that court ordered discovery of his tattoos under New York State Criminal Procedure Law §240.40(2)(b) was unavailable because the tattoos were testimonial. However, this begs the question. Since the tattoos were non-testimonial, the statute permitted their discovery. The language "may order the defendant to provide non-testimonial evidence" does not create any

separate statutory restriction upon non-testimonial evidence beyond the limits imposed by the state and federal constitutions. *People v. Colavito,* 87 N.Y.2d 423 (1996); *People v. Copicotto, id.*; *People v. Alpern*, 217 A.D.2d 853 (2d Dept. 1985). Non-testimonial evidence, even of a prior communicative nature, is not exempted from New York State statutory discovery.

Although the tattoos were incriminating evidence for motive for petitioner's hate crime, he never gave any testimony about them whatsoever. Physical characteristics, which also happen to be prior voluntary communicative statements, reflect prior thoughts and actions without any extortion of contemporaneous thoughts. *Couch v. United States*, 409 U.S. 322 (1973) (privilege does not extend to records possessed by defendant's accountant); *Curcio v. United States*, 354 U.S. 118 (1997) (corporate officer must produce records but retains privilege as to oral testimony); *People v. Berg, id.*; *People v. Hager, id.* Petitioner related no factual assertion nor did he disclose any non-preexisting information. *Pennsylvania v. Muniz, id.*; *Doe v. United States, id.* The Fifth Amendment privilege remained untransgressed.

II. The decision of the New York State Court of Appeals is also in harmony with federal constitutional interpretation of the First, Fourth, Sixth, and Fourteenth Amendments.

Petitioner's other constitutional arguments also lack merit. The right to free speech guarantees the right to express disagreeable and offensive ideas like racial inferiority. U.S. CONST. amend. I. But there is no First Amendment right to exclude nonverbal statements, like membership in an organization or a body tattoo, from being evidence in a criminal case. *R.A.V. v. City of St. Paul, Minnesota,* 505 U.S. 377 (1992); *Dawson v. Delaware*, 503 U.S. 159 (1992); *Wisconsin v. Mitchell*, 508 U.S. 476 (1993). Indeed, courts are not in agreement that all possibly expressive conduct deserves First Amendment protection. *Texas v. Johnson*, 491 U.S. 397 (1989) (flag burning is protected); *Bery v. City of New York*,

97 F.3d 689 (2d Cir. 1996) (public art display is protected); *Yarkew v. Sinclair*, 495 F.Supp. 1248 (D. Minn. 1980) (tattoo is not protected communication); *State v. White*, 348 S.C. 532, 560 S.E.2d 420 (2002) (tattoo is not protected speech); *State v. Medical Lic. Bd. v. Brady*, 492 N.E.2d 34 (Ct. App. Ind. First Dist. 1986) (artistic tattooing not protected).

Once the tattoo has been created and any possible statement intended thereby has been expressed, however, subsequent desire to keep a tattoo concealed has nothing to do with the First Amendment. Depending on the location of the tattoo, the source of such a constitutional claim would have to be the right to privacy. The First Amendment is no barrier to the admission of evidence on one's beliefs or associations. *Dawson v. Delaware, id.*; *Barclay v. Florida*, 463 U.S. 939 (1983). Speech protected by the First Amendment can be used to establish the elements of a crime or to prove motive or intent. *Wisconsin v. Mitchell, id.* Once a tattoo is created, like any other prior statement, it can become evidence in a criminal case.

There was also no violation of the constitutional right to be free from unreasonable search and seizure. U.S. CONST. amend. IV. The touchstone for analysis of this claim is whether society will recognize a legitimate expectation of privacy in the place or object searched. *Katz v. United States, id.* This test has two components: (1) whether a person has manifested some subjective expectation of privacy and (2) whether society should honor that expectation as reasonable. Prior to a lawful arrest, a search or seizure can be considered reasonable if done pursuant to a judicial warrant or if police conduct otherwise falls within some exception to the warrant requirement. Once petitioner surrendered, he conceded police had probable cause to believe he committed a crime. Contemporaneous to this lawful custody, petitioner had a reduced expectation of privacy both subjectively and objectively.

During the arrest process, when petitioner's tattoos were initially photographed, he may have expressed some lack of consent but whether there truly existed a subjective expectation for him to keep his shirt on is debatable. What should not be entertained, however, is petitioner's argument that

photographing outward physical characteristics of appellant's body was an objectively unreasonable search for or seizure of evidence. The creation of arrest photographs is required by New York State statute without being limited to so-called mug shots. See New York State Criminal Procedure Law §§160.01(3) (refers to "the photograph") and 160.50(1)(a) (refers to "every photograph"); *People v. Patterson*, 78 N.Y.2d 711 (1991) (return of arrest photos is not constitutionally required); *People v. Torres*, 291 A.D.2d 273 (1st Dept.), *lv. denied*, 98 N.Y.2d 681 (2002) (photo used to establish appearance, not identification); *People v. Walls*, 277 A.D.2d 959 (4th Dept. 2000), *lv. denied*, 96 N.Y.2d 808 (2001) (tattoo photos admitted); *People v. DiBella, id.* (despite tattoo, photo admitted to establish post-fight physical condition); *People v. Williams*, 170 A.D.2d 552 (2d Dept.), *lv. denied*, 77 N.Y.2d 1002 (1991); *People v. Peters, id.* (post-sale photo admissible); *People v. Gallina*, 110 A.D.2d 847 (2d Dept. 1985) (photo properly used for investigative purpose); *People v. Bagley*, 183 Misc.2d 523 (Sup. Ct. N.Y. Co. 1999); *People v. Lord*, 104 Misc.2d 150 (Crim. Ct. Kings Co. 1980) (statute not designed to thwart creative investigation); *People v. Howard*, 90 Misc.2d 662 (Sup. Ct. N.Y. Co. 1977) (photos may be used to further investigation); *People v. Johnson*, 88 Misc.2d 749 (Co. Ct. Onondaga Co. 1976) (arrest photos should be done at time of arrest); *People v. Killian*, 74 Misc.2d 120 (Co. Ct. Nassau Co. 1973) (lawful duty to photograph). Neither appellant nor counsel can limit the investigative use of an arrest photograph to identification purposes only.

Once a defendant is in lawful custody, he may be forced to exhibit his appearance for more than just a photograph. *Cupp v. Murphy*, 412 U.S. 291 (1973) (fingernail scraping during voluntary questioning); *United States v. Dionisio, id.* (voice exemplars); *United States v. Wade, id.* (lineup with voice exemplars); *People v. Whitaker*, 64 N.Y.2d 347, *cert. denied*, 474 U.S. 830 (1985) (filler for unrelated lineup); *People v. Randt*, 142 A.D.2d 611 (2d Dept. 1988) (pubic combing); *People v. London*, 124 A.D.2d 254 (3d Dept.), *lv. denied*, 68 N.Y.2d 1001 (1986) (lineup on probable cause without filed charges); *People v. Smith, id.* (voice exemplar); *People v. Rumph*, 128 Misc.2d 438 (Sup.

Ct. Kings Co. 1985) (discolored knee display); *People v. Mineo*, 85 Misc.2d 919 (Sup. Ct. Queens Co. 1976) (palm prints); *People v. Allah*, 84 Misc.2d 500 (Sup. Ct. Bronx Co. 1975) (dental impressions); *People v. Sallow*, 100 Misc. 447 (Ct. Gen. Sess. N.Y. Co. 1917) (fingerprints).

Of course, surrendering into custody is not an abandonment of all Fourth Amendment rights. The limits of acceptable police conduct are clear. There can be no physical intrusion beneath the skin without judicial approval and no invasion of personal dignity. *Winston v. Lee*, 470 U.S. 759 (1985) (surgical removal of bullet); *Schmerber v. California, id.* (blood withdrawn); *Rochin v. California*, 342 U.S. 165 (1952) (stomach pumped); *Lauro v. Charles*, 219 F.3d 202 (2d Cir. 2000) (no more "perp walks"); *People v. Ramirez-Portoreal*, 88 N.Y.2d 99 (1996) (surrender of control does not equal waiver of all privacy); *People v. Natal*, 75 N.Y.2d 379 (1990) (property given up at jail can go to DA without warrant); *People v. Cwikla*, 46 N.Y.2d 434 (1979) (wig worn during lineup did not infringe upon right to determine appearance); *People v. Evans*, 43 N.Y.2d 160 (1977) (arrest must precede full body search).

The intrusion into personal privacy that is a full custodial arrest had already taken place. Additional lesser intrusions were not objectionable. *People v. Whitaker, id.*; *People v. Perel*, 34 N.Y.2d 462 (1974); *People v. Chiagles*, 237 N.Y. 193 (1923). The permissible scope of intrusion depends on the crime charged, individual characteristics of the person in custody, and point in the investigation that detention occurred. Even if evidence is later held inadmissible due to privilege, that does not render the initial seizure unlawful. *People v. Perel, id.*

Besides being independently reasonable, there is also the exception to the warrant requirement known as search incident to arrest. While the tattoos did not pose any safety threat, there remained a possibility of destruction, concealment, or alteration. *United States v. Robinson*, 414 U.S. 218 (1973); *People v. Tejada*, 93 N.Y.2d 963 (1999) (post-arrest wallet search); *People v. Grokey*, 60 N.Y.2d 309

(1983); *People v. Smith*, 59 N.Y.2d 454 (1983); *People v. DeSantis*, 46 N.Y.2d 838 (1978), *cert. denied*, 443 U.S. 912 (1979); *People v. Belton*, 55 N.Y.2d 49 (1982); *People v. Spruill, id.*; *People v. Archibald*, 269 A.D.2d 682 (2d Dept.), *lv. denied*, 92 N.Y.2d 880 (2000); *People v. Randt, id., People v. Levan*, 91 A.D.2d 384 (1st Dept. 1983). Thus, photography enabled the police to preserve the tattoos as they existed only six weeks after the crime. Indeed, at least one defendant has argued that a photograph of a tattoo is less prejudicial than a live display. *People v. Herr*, 203 A.D.2d 927 (4th Dept. 1994), *aff'd*, 86 N.Y.2d 638 (1995). Surely the decision to keep that choice available was reasonable. The completeness of the search incident to arrest needs no additional justification. *People v. Weintraub*, 35 N.Y.2d 351 (1974); *Horton v. California*, 496 U.S. 128 (1990); *New York v. Belton*, 453 U.S. 454 (1981); *Chimel v. California*, 395 U.S. 752 (1969); *People v. Marsh*, 20 N.Y.2d 98 (1967); *People v. Taylor*, 294 A.D.2d 825 (4th Dept. 2002); *People v. Barclay*, 201 A.D.2d 952 (4th Dept. 1994).

The presumption that petitioner knew how the photographs of his tattoos would be used is not a factor in analyzing whether the procedure was reasonable. In fact, their actual ultimate use is also not a factor in assessing the reasonableness of the process used to take them. Although defense counsel puts large stock in his written directives that his client would make no statements, the photographic procedure was not his to control. There are no partial surrenders. Physical dominion over petitioner could not be limited by defense counsel. Basic human dignity does not prevent the removal of a shirt. Once the neck tattoo was observed in plain view, the police were entitled to look for other tattoos. The ability to photograph the tattoos was coextensive with the ability to testify about them. Observing and recording tattoos through photography is hardly a remarkable procedure, much less a reprehensible one. Petitioner's objection to the creation of the tattoo photographs cannot withstand any scrutiny.

Once the tattoo photographs were taken, their subsequent use had absolutely no Fourth Amendment implications. *People v. King*, 232 A.D.2d 111 (2d Dept. 1997) (DNA

sample reused for different rape). Defense counsel made repeated attempts to suppress or exclude the tattoo photographs, which permitted comprehensive judicial review. This opportunity to challenge the photographs fully protected petitioner's rights, even the supposed right to limit the procedure to mug shots. Even involuntary statements remain discoverable prior to determining admissibility. *People v. Huntley*, 15 N.Y.2d 72 (1965). There was no legitimate expectation of privacy to prevent post-arrest photography of appellant's tattoos and the subsequent court order to that effect removed any taint that the arrest procedure could have had on the evidence used at trial.

Nor was there any denial of the right to counsel when the arrest photographs were taken over defense counsel's objection. U.S. CONST. amend. IV. While arrest is a critical stage if counsel is already in place, routine arrest processing is not. Defense counsel did tell police his client would be making no statements, but this directive was honored. Taking pictures of tattoos is not taking a statement. The non-verbal act of being posed for a photograph is only a statement when it is accompanied by an existing thought intended to be expressed to and understood by another. When the intent to make a statement is specifically disavowed, there is no statement. Preservation of statements previously created cannot and should not be stopped by defense counsel.

Petitioner argues that his right to due process and a fair trial was violated by the use of his prejudicial tattoos. U.S. CONST. amend. V and amend. XIV. We would merely reiterate that the relevance of these prejudicial tattoos to motive was argued ad nauseum at every level of petitioner's prosecution. Indeed, our brief in the New York State Court of Appeals surveyed numerous jurisdictions to explain how they treat evidence of tattoos as motive.[3]

---

[3] See *People v. Skinner*, 53 P.2d 720 (Colo. Ct. App., Div. V 2002); *King v. State*, 29 S.W.3d 556 (Tex. Crim. App. 2000); *State v. Novak*, 949 S.W.2d 168 (Mo. App. 1997); *Commonwealth v. Romero*, 1997 WL

(Continued on following page)

Finally, we must point out that there was no reasonable possibility of acquittal even if there was a violation of the Fifth Amendment. *Arizona v. Fulminante*, 499 U.S. 279 (1991). In the dissent below, both Judge Kaye and Judge Ciparick held that admission of the tattoo evidence was error under their interpretation of the privilege against self-incrimination. However, they both agreed that the error was harmless beyond a reasonable doubt due to the overwhelming evidence of guilt. This factor alone should obviate the alleged need for review in the United States Supreme Court.

CONCLUSION

For these reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

STEVEN A. HOVANI
Counsel for Respondent
Suffolk County District
Attorney's Office
Criminal Courts Building
200 Center Drive
Riverhead, New York 11901
631-852-2463

MICHAEL BLAKEY
Assistant District Attorney
On the Brief

1070445, 43 Va. Cir. 530 (Cir. Ct. Va. Fairfax Co. 1997); *State v. Phelps*, 197 W.Va. 713, 478 S.E.2d 563 (Sup. Ct. App. W. Va. 1996); *People v. Aishman*, 19 Cal. Rptr.2d 444 (Col. App. 4 Dist. 1993); *State v. Macias*, 481 So.2d 979 (Dist. Ct. App., 4 Dist. 1986), *aff'd*, 515 So.2d 206 (Sup. Ct. Fla. 1987); *State v. Lee*, 51 N.C. App. 344, 276 S.E.2d 501 (N.C. Ct. App. 1981); *State v. Bowden*, 113 R.I. 649, 324 A.2d 631 (Sup. Ct. R.I. 1974); *People v. Witherspoon*, 26 Ill.2d 483, 190 N.E.2d 281 (Sup. Ct. Ill. 1963).